Sulaiman Mat Tekor & Ors v National Population and Family Development Board

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–21–20 OF 2000
MOHD HISHAMUDIN J
31 OCTOBER 2008

Civil Procedure — Pleadings — Issue not pleaded — Whether plaintiffs at liberty to raise issues not pleaded in statement of claim

Labour Law — Employment — Contract of employment — Whether plaintiffs entitled to be emplaced in higher salary scale — Whether defendant had committed breach of contract by not adopting service circulars issued by government

The defendant was a statutory body established under the Population and Family Development Act 1966 ('the Act'). Pursuant to s 5(1)(g) of the Act, the defendant employed the plaintiffs to carry out the powers, functions and duties of the defendant board. All the plaintiffs, who were not university degree holders, were recruited by the board as field assistants but later they were promoted to assistant information/publication officers and placed under the domestic salary scheme. However, in 1975 the defendant implemented another scheme known as the Harun Salary Scheme ('Harun salary scheme') under which the salary was determined by the employee's academic qualification. Since the plaintiffs did not possess any degree qualification they were offered the salary scale Grade B13–4 with the option to accept or reject this scheme. The plaintiffs accepted the option offered and became known as information/publication officers. On 1 July 1977, the defendant adopted the Public Service Department's (the PSD's) Service Circulars of 1977 and implemented the Cabinet Committee salary scheme ('the CCR salary scheme'). The plaintiffs were again granted the option of accepting or rejecting the CCR salary scheme. All the plaintiffs accepted the offer by signing the option papers and were emplaced in the B11 salary scale of the CCR salary scheme. Subsequently, the government issued two other service circulars ('the circulars') which emplaced the information officers in the Ministry of Information on the A22 salary scale of the CCR salary scheme, although these officers did not have a degree qualification provided they held the position of information officer for at least five years. The defendant did not implement these circulars and this became the source of the plaintiffs'

discontent. The 13 plaintiffs, who were unhappy with the employment grade they were in, had commenced this writ action against the defendant contending that the board should have implemented these circulars for the benefit of its employees so that the plaintiffs and others like them could be emplaced on the A22 salary scheme. The plaintiffs' claim that their scope of work was similar to the information officers in the Ministry of Information and that they had satisfied the requisite number of years of service as stipulated in the circulars. As such by way of their writ action, the plaintiffs were seeking against the Board for a declaration that they were entitled to be emplaced in the higher salary scale ie the A22 scale instead of the lower salary scale ie the B11 scale, when the board adopted the CCR salary scheme. In their defence the defendant board submitted that the plaintiffs had no cause of action against the defendant as they could not show that the defendant had committed a breach of the service contract between the plaintiffs and the defendant when it did not implement the circulars. The defendant board also submitted that the plaintiffs had never objected to the conversion from the domestic salary scheme to the Harun salary scheme and thereafter to the CCR salary scheme but had instead willingly signed the option papers offered to them each time. The plaintiffs submitted that when the defendant adopted the Harun salary scheme it had erroneously and unlawfully emplaced the plaintiffs in the B13–4 scale. The plaintiffs further submitted that with the adoption of the CCR salary scheme by the defendant the plaintiffs' posts in the Harun salary scheme had become '*jumud*' meaning that their posts had become static or superseded. The plaintiffs therefore claimed that as the holders of a *jumud* post they would have been deprived of any promotion or career advancement and therefore were 'forced' to accept the CCR salary scheme.

Held, dismissing the action with costs:

(1) There is no legal requirement that compels the defendant to adopt the circulars. In fact the government did not intend the circulars to apply to the defendant. Furthermore, in view of the contractual nature of the plaintiffs' employment with the defendant, and taking into account the fact that the defendant was a separate legal entity vis-à-vis the Federal Government, the question as to whether it was right or not for the defendant to not apply the circulars to the plaintiffs was strictly a moral issue rather than a legal issue. In the final analysis, since the plaintiffs were correctly placed in the B13–4 salary scale under the Harun salary scheme, they were also correctly placed in the B11 salary scheme under the CCR salary scheme upon conversion to the latter scheme (see paras 29 & 37).

(2) The plaintiffs' submission that when the defendant adopted the Harun salary scheme it had erroneously and unlawfully emplaced the plaintiffs in the B13–4 scale was not pleaded in the statement of claim and therefore could not be raised as parties were bound by their pleadings. In any case since the plaintiffs did not have degree qualifications the defendant was right to have emplaced them in the B13–4 salary scale when converting from the domestic salary scheme to the Harun salary scheme. The legal burden was on the plaintiffs to prove on a balance of probabilities that they were erroneously placed in the B13–4 salary scale by the defendant under the Harun salary scheme and they had failed to discharge this burden. Furthermore, by signing the option papers agreeing to the conversion to the B13–4 salary scale and not doing anything positive thereafter for 32 years to protest against that emplacement the plaintiffs had acquiesced to the act of the defendant in placing them in that salary scale (see paras 30, 40–41).

(3) Similarly the plaintiffs' *jumud* issue ought not to have been raised because it was not pleaded in the statement of claim. In any event there was evidence that a *jumud* post would not be deprived of any promotion or career advancement simply by reason of the fact that it was a *jumud* post (see para 35).

[Bahasa Malaysia summary

Defendan adalah sebuah badan berkanun yang ditubuhkan di bawah Akta Penduduk dan Pembangunan Keluarga 1966 ('Akta'). Menurut s 5(1)(g) Akta tersebut, defendan telah menggaji plaintif-plaintif untuk melaksanakan kuasa, fungsi dan tugas lembaga defendan. Kesemua plaintif, yang bukan pemegang ijazah universiti, telah direkrut oleh lembaga sebagai pembantu lapangan tetapi kemudiannya mereka telah dinaikkan pangkat kepada penolong pegawai penerangan/penerbitan dan telah diletakkan di bawah skim gaji domestik. Walau bagaimanapun, pada tahun 1975 defendan telah melaksanakan skim lain yang dikenali sebagai Skim Gaji Harun ('skim gaji Harun'), di mana gaji ditentukan oleh kelayakan akademik pekerja. Memandangkan kesemua plaintif tidak memiliki apa-apa kelayakan ijazah mereka telah ditawarkan skala gaji Gred B13–4 dengan pilihan untuk menerima atau menolak skim ini. Plaintif-plaintif telah menerima pilihan yang ditawarkan dan dikenali sebagai pegawai penerangan/penerbitan. Pada 1 Julai 1977, defendan menggunapakai Pekeliling Perkhidmatan Jabatan Perkhidmatan Awam ('JPA') 1977 dan melaksanakan Skim Gaji Jawatankuasa Kabinet ('skim gaji CCR'). Kesemua plaintif sekali lagi diberikan pilihan untuk menerima atau menolak skim gaji CCR. Kesemua plaintif telah menerima tawaran tersebut dengan menandatangani dokumen pilihan dan telah ditempatkan di skala gaji B11 skim gaji CCR. Selepas itu, kerajaan telah mengeluarkan dua lagi pekeliling perkhidmatan ('pekeliling')

yang menempatkan pegawai-pegawai penerangan di Kementerian Penerangan pada skala gaji A22 skim gaji CCR, walaupun pegawai-pegawai ini tidak memiliki ijazah jika mereka telah memegang jawatan sebagai pegawai penerangan sekurang-kurangnya lima tahun. Defendan tidak melaksanakan pekeliling ini dan ini menjadi punca ketidakpuasan plaintif-plaintif. 13 orang plaintif yang tidak berpuas hati dengan gred pekerjaan mereka, telah memulakan tindakan writ ini terhadap defendan menegaskan bahawa lembaga hendaklah melaksanakan pekeliling ini demi kepentingan pekerja-pekerjanya agar plaintif-plaintif dan orang lain seperti mereka boleh ditempatkan dalam skim gaji A22. Tuntutan plaintif-plaintif menyatakan bahawa skop kerja mereka adalah sama dengan pegawai penerangan di Kementerian Penerangan dan mereka telah memenuhi bilangan tahun perkhidmatan yang diperlukan seperti yang termaktub dalam pekeliling. Oleh itu, melalui tindakan writ mereka, plaintif-plaintif memohon terhadap lembaga untuk deklarasi yang mereka berhak untuk ditempatkan dalam skala gaji yang lebih tinggi iaitu skala A22 berbanding dengan skala gaji yang rendah iaitu skala B11 apabila lembaga menggunapakai skim gaji CCR. Dalam pembelaan mereka lembaga defendan menghujahkan bahawa plaintif-plaintif tidak mempunyai kausa tindakan terhadap defendan apabila mereka tidak menunjukkan bahawa defendan telah melakukan pelanggaran kontrak perkhidmatan antara plaintif-plaintif dengan defendan apabila tidak melaksanakan pekeliling tersebut. Defendan juga menghujahkan bahawa plaintif tidak pernah membantah terhadap penukaran daripada skim gaji domestik kepada skim gaji Harun dan kemudiannya skim gaji CCR tetapi sebaliknya dengan rela hati menandatangani dokumen pilihan yang ditawarkan kepada mereka setiap kali. Plaintif-plaintif menghujahkan bahawa apabila defendan menggunapakai skim gaji Harun ianya secara salah dan tidak sah menempatkan plaintif-plaintif dalam skala B13–4. Plaintif-plaintif selanjutnya menghujahkan bahawa dengan mengguna pakai skim gaji CCR oleh defendan jawatan plaintif-plaintif telah menjadi 'jumud' yang bermaksud jawatan mereka telah menjadi statik. Oleh itu plaintif-plaintif menuntut bahawa sebagai pemegang jawatan yang 'jumud' mereka telah dinafikan hak untuk kenaikan pangkat atau peningkatan kerjaya dan oleh itu 'terpaksa' menerima skim gaji CCR.

Diputuskan, menolak tindakan dengan kos:

(1) Tidak terdapat keperluan perundangan yang memaksa defendan untuk menerima pakai pekeliling tersebut. Sesungguhnya, kerajaan tidak bermaksud pekeliling terpakai kepada defendan. Selanjutnya, berkenaan sifat kontraktual penggajian plaintif-plaintif dengan defendan, dan mengambilkira fakta bahawa defendan adalah entiti perundangan yang berasingan berbanding dengan Kerajaan

Persekutuan, persoalan adalah sama ada ianya benar atau tidak bagi defendan tidak mengguna pakai pekeliling kepada plaintif-plaintif adalah isu moral semata-mata dan bukannya isu perundangan. Dalam analisis terakhir, memandangkan plaintif-plaintif ditempatkan secara betul di dalam skala gaji B13–4 di bawah skim gaji Harun, mereka juga secara betul ditempatkan di dalam skim gaji B11 di bawah skim gaji CCR atas pertukaran terhadap skim tersebut (lihat perenggan 29 & 37).

(2) Hujahan plaintif-plaintif bahawa apabila defendan menggunapakai skim gaji Harun ianya telah secara salah dan tidak sah menempatkan plaintif-plaintif dalam skala B13–4 adalah tidak diplidkan dalam pernyataan tuntutan dan oleh itu tidak boleh dibangkitkan kerana pihak-pihak adalah terikat dengan pliding mereka. Dalam apa keadaan, memandangkan plaintif-plaintif tidak memiliki kelayakan ijazah, adalah betul untuk defendan menempatkan mereka dalam skala gaji B13–4 apabila bertukar daripada skim gaji domestik kepada skim gaji Harun. Beban perundangan terletak pada plaintif-plaintif untuk membuktikan atas imbangan kebarangkalian bahawa mereka telah secara salah ditempatkan dalam skala gaji B13–4 oleh defendan di bawah skim gaji Harun dan mereka telah gagal untuk melepaskan beban ini. Selanjutnya, dengan menandatangani dokumen pilihan sebagai bersetuju dengan skala gaji B13–4 dan tidak melakukan apa-apa yang positif selepas 32 tahun untuk membantah terhadap penempatan tersebut, plaintif-plaintif telah akur dengan tindakan defendan yang menempatkan mereka dalam skala gaji tersebut (lihat perenggan 30, 40–41).

(3) Begitu juga dengan isu jumud tidak patut dibangkitkan kerana ianya tidak diplidkan dalam pernyataan tuntutan. Dalam apa-apa keadaan terdapat keterangan bahawa jawatan yang jumud tidak akan menafikan mana-mana kenaikan pangkat atau peningkatan kerjaya hanya dengan alasan bahawa ianya adalah jawatan yang jumud (lihat perenggan 35).]

Notes

For cases on contract of employment, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 862–886.

For cases on issue not pleaded, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5447–5451.

Cases referred to

Country Heights Holdings Bhd v Rating Agency Malaysia Bhd [2008] 8 CLJ 301, HC (refd)

Legislation referred to

Federal Constitution arts 132, 135, 136, 146
Population and Family Development Act 1966 ss 3, 5(1)(g)

S Kanawagi (Riza Makhzan and Dinesh Kanawagi with him) (Khana & Co) for the plaintiffs.
Karlos Israphil (Seira Sacha with him) (Zaid Ibrahim & Co) for the defendant.

Mohd Hishamudin J:

[1] The plaintiffs are employees of the defendant. They currently hold the posts of information/publication officers in the defendant's establishment.

[2] The defendant is a statutory authority/body established under an Act of Parliament, namely, the Population and Family Development Act 1966 (Revised 1988) ('the Act'). Under s 3 of the Act, the board of the defendant ('the board') is known by the name of 'National Population and Family Development Board'. The board is established as a body corporate with a perpetual succession and a common seal. Like any other typical statutory authority/body, the board may sue and be sued, may enter into contracts, including employment contracts with its employees; and may hold property. In other words, the board, like any other corporation, is clothed with a legal personality.

[3] Statutory bodies (or statutory authorities) are entities which are, legally speaking, largely (but not absolutely, as they are subject to some degree of ministerial control) independent of the government. Employees of statutory bodies are not public servants in the sense that they do not belong to the public services under art 132 of the Federal Constitution. As such, they do not enjoy the protection of arts 135, 136 and 146 of the Federal Constitution. Their contracts of service are not with the Federal Government, but with the respective statutory authorities. Although for the sake of uniformity it is the Federal Government policy that statutory authorities are to adopt Service Circulars issued by the Public Service Department ('the PSD'— a very important department of the Federal Government that manages and controls services matters pertaining to government employees of all ranks) in cases where such circulars are intended to apply to statutory bodies, nevertheless, such service circulars do not automatically apply to such bodies. Hence, in the case of the defendant, for example, for any service circular issued by the Public Service Department to apply to the defendant, the board must first adopt that service circular by way of regulations.

[4] Pursuant to s 5(1)(g) of the Act, the defendant may employ 'such officers and servants as may be necessary on such terms as may be approved

by the Minister for carrying out the powers, functions and duties of the board'. It is important to note (to avoid any misconception) that under this s 5(1)(g) of the Act the Minister has no power to make regulations pertaining to the terms and conditions of the officers and servants of the board. The authority vested with the powers to make such regulations is the board itself. The Minister is merely conferred with the power to approve or not to approve the regulations made by the board. This means that until it is approved by the Minister, any regulations made by the board pertaining to the terms and conditions of service of employees of the defendant are of no legal effect.

[5] The 13 defendants are unhappy with the employment grade they are in. They are seeking against the board for a declaration that they are entitled to be emplaced in the higher salary scale, that is, salary scale A22 instead of the lower salary scale, that is, salary scale B11, when the board adopted the Cabinet Committee Report salary scheme ('the CCR salary scheme').

DOMESTIC SALARY SCHEME

[6] In order to appreciate the nature of the plaintiffs' alleged grievance, we have to go back in time to the point when they were first employed by the board. Originally, they were recruited by the board as field assistants. Later they were promoted as assistant information/publication officers (*penolong pegawai penerangan/penerbitan*). The plaintiffs were then under a domestic scheme known as *Peraturan-Peraturan dan Kaedah-Kaedah mengenai Pengambilan, Perlantikan dan Naik Pangkat 1969* ('the Domestic Salary Scheme'). Their salary scale under this Domestic Salary Scheme is known as the division 3 salary scale.

[7] In the present case, a significant fact is that none of the plaintiffs possess any university degree.

THE HARUN SALARY SCHEME

[8] The Royal Commission on the Remunerations and Conditions of Service in Local Authorities and Statutory Authorities under the chairmanship of the Hon Justice Harun Hashim ('the Harun Commission' or 'the Harun Report') was established to standardise the service and salary schemes of statutory bodies and local authorities. The recommendations of the Harun Commission's Report were implemented by the defendant on 1 January 1975. Employees of the defendant were issued with option papers. Under the Harun salary scheme, the salary scale is determined by the employee's academic qualification. The plaintiffs, as said earlier, did not possess any degree qualification. Hence, they were offered the salary scale

grade B13–4. The plaintiffs accepted the option offered. Under the Harun salary scheme, their post is known as *pegawai penerangan/penerbitan*.

THE CABINET COMMITTEE SALARY SCHEME

[9] In 1976 the Federal Government decided to have a single service and salary scheme for the public sector, that is to say, for both the government as well as for the statutory bodies (and local authorities).

[10] Hence the CCR salary scheme was implemented by the Public Services Department and by the statutory bodies (as well as local authorities), including the defendant, on 1 July 1977.

[11] The outstanding difference between the CCR salary scheme and the Harun salary scheme is that, under the latter, appointments and promotions are based purely on academic qualification. For example, only those with a diploma may be appointed to a category *B* post; and only those with university degree or equivalent, including professional qualification, may be appointed to a category *A* post.

[12] The defendant did adopt and implement the PSD's Service Circular of 1977. This circular directs all government departments and statutory authorities to adopt the CCR salary scheme. The defendant issued option papers to its employees on 1 May 1977. Every employee must state and sign in the option paper as to whether or not he/she accepts the CCR salary scheme.

[13] All the plaintiffs accepted the offer and duly signed the option papers and were emplaced in the B11 salary scale of the CCR salary scheme.

[14] Subsequently the government issued two other circulars, namely, service circular No 6/77 on 2 June 1977 and service circular No 23/77 on 26 September 1977 through the Public Service Department. These circulars emplaced information officers in the Ministry of Information on the A22 salary scale of the CCR salary scheme, although these officers do not have a degree qualification, provided these officers have been holding the post of information officer for at least five years.

[15] The plaintiffs' discontent arose after the issuance of these two PSD's circulars.

[16] What happened was that the defendant did not implement these service circulars No 6/77 and No 23/77.

A **[17]** The plaintiffs contend that the board should have implemented these service circulars for the benefit of the employees of the defendant, in particular, the plaintiffs, so that they too could be emplaced on the A22 salary scale. The plaintiffs claim that their scope of work is similar to that of the information officers in the Ministry of Information and that they have
B satisfied the requisite number of years of service as stipulated in the circulars.

[18] Hence, the plaintiffs commenced this writ action against the defendant.

C **[19]** Learned counsel for the defendant, Encik Karlos Israphil, submits that the plaintiffs have no cause of action against the defendant unless the plaintiffs could show that the defendant by placing the plaintiffs in salary scale A22 in the CCR salary scheme has committed a breach of the service contract between the plaintiffs and the defendant. Counsel submits that the
D plaintiffs have failed to do so.

[20] At the conclusion of the trial, I dismissed the plaintiffs' claim with costs.

E **[21]** I shall now give my grounds.

[22] During case management, parties agree that there shall be only one main issue to be tried, namely:

F
> On implementing the Cabinet Committee Report Scheme, 1977 on 1 July 1977, was the defendant right in law in placing the plaintiffs in the Cabinet Committee Report salary scheme of B11; or, whether the defendant should have placed the plaintiffs in Cabinet Committee Report salary scheme of A22?

G **[23]** I shall in this judgment be referring to the above issue as the agreed main issue to be tried.

[24] Having heard the evidence and the submissions, I am satisfied that the
H plaintiffs have failed to disclose any reasonable cause of action. I so hold because the plaintiffs' witness (Encik Ahmad Nizar — PW1) himself admitted in cross-examination that, as the plaintiffs were in the B13–4 salary scheme under the Harun salary scheme, they were therefore only entitled to be converted to the B11 salary scale under the CCR salary scheme. I shall
I refer to his evidence:

> Q: Based on the conversion table provided at page 205, do you agree that since the plaintiffs were in the B13–4 salary scheme under Harun Salary Scheme they were

therefore only entitled to be converted to B11 salary scheme under the Cabinet Committee Report 1977 salary scheme? A

A: Based on this formula, I agree.

[25] Now, an important observation is that the plaintiffs never objected when, upon conversion from the domestic salary scheme to the Harun salary scheme, they were emplaced in the B13–4 scale. On the contrary they willingly signed the option papers offered to them by the defendant in 1975. They never challenged the legality of being emplaced on the salary scale B13–4 when converting from the domestic salary scheme to the Harun salary scheme. It is only now at this trial (32 years later!) that the plaintiffs are complaining that they should not have been placed in the B13–4 scale under the Harun salary scheme. With respect, I think it is rather too late for them to complaint. B C D

[26] Likewise, they never objected when under the CCR salary scheme they were emplaced on the B11 salary scale. They willingly signed the option papers. This is what PW1 said in evidence:

Q: Based on the same formula as provided at page 205, A1, do you also agree that the plaintiffs were not entitled to be placed in Grade A22 scale under the new Cabinet Committee Report scheme? E

A: At the time of the option, yes. But our grievances are after the issuance of Circulars 6/77 and 23/77.

Q: Do you agree that after the plaintiffs have accepted the option, the defendant had in fact followed and applied the conversion formula as contained at page 205? F

A: Yes, at the time of the option we Agreed. The issue came out earlier after the issuance of Circulars No 6/77 and 23/77.

It is to be observed that the witness makes reference to two Government Circulars, namely, Circular No 6/77 and Circular No 23/77. Yet the witness in evidence agrees that Circulars No 6/77 and 23/77 were not applicable to them but only applicable to certain categories of employees in the government sector. When asked: G H

Q: Are you of the view that the Government had acted unfairly or unreasonably against the plaintiffs when Circulars No 6/77 and 23/77 were not made applicable to them?

[27] the witness answered: I

A: I think the government is very fair. But here I think the defendant is not sensitive to the welfare of the staff and I think the information officers have sacrificed and have the experience but not a university degree.

[28] At this juncture it is important to take into account the evidence of the defendant's witness, Encik Adzhar bin Ismail (DW1) an administrative officer of the Human Resources Department of the defendant. He said in evidence that the two service circulars were not meant to be applicable to statutory bodies: they were meant to be applicable to government employees under the Suffian salary scheme.

[29] In my judgment that there is nothing in law that compels the defendant to adopt these two service circulars. To my mind, as the government did not intend the two service circulars to apply to the defendant, but to only those under the Suffian salary scheme (the service scheme established following the recommendations of the Royal Commission on the salaries and conditions of service of government employees chaired by the Honourable Justice Mohd Suffian Hashim), in view of the contractual nature of the plaintiffs' employment with the defendant, and taking into account the fact that the defendant is a separate legal entity vis-à-vis the Federal Government, the question as to whether it was right or not for the defendant in not applying the two PSD's circulars to the plaintiffs is strictly a moral issue rather than a legal issue.

[30] Now, going back to the Harun salary scheme, learned counsel for the plaintiffs, Encik Kanawagi, submits that in adopting the Harun salary scheme the defendant erroneously and unlawfully emplaced the plaintiffs in the B13–4 scale. Learned counsel for the plaintiffs contends that the plaintiffs should have been emplaced in the A11–9 salary scale (a higher salary scale) upon converting to the Harun salary scheme. With respect, this issue cannot be raised by counsel. Firstly, this issue is not pleaded in the statement of claim. Secondly, this is not an issue that comes within the 'Agreed Main Issue to be Tried'. Thirdly, as submitted by learned counsel for the defendant, Encik Karlos Israphil, in his written submission:

Isu berkenaan peletakan plaintif-plaintif dalam tangga gaji B13–4 di bawah Skim Suruhanjaya Harun hanya ditimbulkan buat kali pertama kali oleh plaintif-plaintif semasa perbicaraan (dalam tahun 2007), setelah 32 tahun berlalu semenjak opsyen itu di terima dalam tahun 1975.

[31] In any event the plaintiffs themselves in their evidence through PW1 have conceded that they have been correctly emplaced in the B13–4 salary

scale when converting to the Harun salary scheme. This is what PW1 said in evidence

Q: I put it to you that the plaintiffs were aware that if they accepted the conversion to the Harun Salary Scheme they would be placed on the Grade B13–4, as in page 82 of A4?

A: Yes.

Q: I put it to you that the plaintiffs never challenged their placement into Grade B13-4 after conversion to Harun Salary Scheme.

A: I agree we did not challenge at that time.

[32] The position taken by PW1 in his evidence above is consistent with the position taken by the defendant's witness, DW1 (which I accept), that since the plaintiffs did not have any degree qualification they ought to be emplaced in the B13–4 salary scale when converting to the Harun Salary Scheme. DW1 further clarified in evidence — and, in my view, correctly — that the plaintiffs could not be emplaced in the A11–9 salary scale when converting to the Harun Salary Scheme because the post of 'Publication Officer' that appears in the salary scale of A11–9 is only meant for those officers with a degree qualification.

[33] Encik Kanawagi also submits that the plaintiffs did not sign the option papers with full awareness of the implications because the plaintiffs when accepting the Harun salary scheme salary scale of B13–4 were neither consulted nor explained before they signed the option papers. With respect, this argument must also be rejected. This allegation (of not being consulted or explained) is not pleaded. It is also not an agreed main issue to be tried. Even in re-examination the plaintiffs, in their evidence, said that the conversion formula was correct and that they found no problem with the conversion to the Harun salary scheme's scale of B13–4. This is what PW1 said in re-examination:

Q: Did the defendant in converting from the Harun Scheme to the Cabinet Committee Report 1977 Scheme consult or explain to the plaintiffs the new formula for conversion?

A: No.

Q: If the plaintiffs were not consulted or explained the formula, why did the plaintiffs accept the defendant's formula as the correct one?

A: As I told earlier, I accepted the option in good faith.

Q: How do you know that the conversion formula undertaken by the defendant is a correct one?

A: Through the option papers that were given to me.

...

Q: Why did the plaintiffs accept the defendant's formula to convert from the domestic scheme to the Harun Service Scheme as the correct one?

A: We accepted it in good faith.

Q: After the Harun Service Scheme was accepted and implemented, did you find any fault or problem with that scheme?

A: No.

[34] In evidence and submission the plaintiffs also raised the *jumud* argument. The plaintiffs' complaint is that, with the adoption of the CCR salary scheme by the defendant, the plaintiffs' posts in the Harun salary scheme (with the B13–4 salary scale) in the defendant's establishment have become *jumud* meaning that the posts have become 'static' or 'superseded'. The plaintiffs' *jumud* posts, however, were not immediately abolished with the implementation of the conversion. What would happen to the plaintiffs' existing posts under the Harun salary scheme upon the defendant adopting the CCR salary scheme is this. The holder of the *jumud* post (with the B13–4 salary scale), since he did not opt for the CCR salary scheme, is allowed to continue in his employment under the existing B13–4 (Harun salary scheme) scale. However, his post becomes jumud meaning that once he resigned or retired or his service is terminated, his post will be abolished. The plaintiffs allege that as their posts under the Harun salary scheme have now become *jumud* it was pointless for them to remain in the posts as to do so would place them in a less favourable position as compared to those who opted for the new B11 salary scale under the CCR salary scheme. They claim that they would lose out in terms of promotion and career advancement. They argue that this being the case they had no choice but to accept the option to convert to the B11 salary scale under the CCR salary scheme. In other words, it is the plaintiffs' contention that they were 'forced' to sign the option papers in favour of the CCR salary scheme with the salary scale of B11.

[35] With respect, in my judgment, this *jumud* issue ought not to have been raised as it is not pleaded in the statement of claim.

[36] In any event there is the evidence of DW1 (which I accept) that the holder of a *jumud* post will not be deprived of any promotion or be placed in a less favourable position in terms of career advancement simply by reason of the fact that the post he holds is a *jumud* post.

[37] In the final analysis (putting aside for the moment the issue pertaining to the two PSD's service circulars) it appears to be common ground that *if* the plaintiffs were *correctly* placed in the B13–4 salary scale under the Harun salary scheme *then* they are also *correctly* placed in the B11 salary scale under the CCR salary scheme upon conversion to the latter scheme.

[38] Thus, essentially the question is: Were the plaintiffs correctly placed in the B13–4 salary scale when the defendant converted from the domestic salary scheme to the Harun Salary Scheme? If the answer is in the affirmative, then (again putting aside for the moment the issue of the two PSD service circulars) the plaintiffs were correctly emplaced in the B11 salary scale upon conversion to the CCR salary scheme.

[39] The plaintiffs' position appears to be somewhat inconsistent. In his evidence PW1 states that the plaintiffs were correctly emplaced in the B13–4 salary scale when converting to the Harun salary scheme. But Encik Kanawagi, in his written submission, contends that the emplacement was erroneous and unlawful.

[40] The legal burden is on the plaintiffs to prove on a balance of probabilities that they were wrongly or unlawfully emplaced in the B13–4 salary scale by the defendant under the Harun salary scheme. In my judgment, the plaintiffs have failed to discharge this burden. In fact, in the first place, the plaintiff never pleaded in their statement of claim that their emplacement in the B13–4 salary scale under the Harun salary scheme was erroneous or unlawful. It is elementary that parties are bound by their pleadings. Indeed, on the contrary, their evidence, as I have referred to above, suggests that they were correctly emplaced in the B13–4 salary scale under the Harun salary scheme.

[41] In any event, on the supposition that they were unlawfully or erroneously emplaced in the B13–4 salary scale under the Harun salary scheme, as a matter of law it is now too late for the plaintiffs to complain. The plaintiffs by signing the option papers way back in 1975 and by doing nothing positive thereafter for 32 years to protest against that emplacement, have acquiesced to the act of the defendant in placing them in the B13–4 salary scale. In *Country Heights Holdings Bhd v Rating Agency Malaysia Bhd* [2008] 8 CLJ 301, I state the following principle (at p 305):

> It is a principle of law that where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act,

A and who might have otherwise have abstained from it, to believe that he assents to its being committed, that person (who stands by) has acquiesced to that act; and that person so standing by cannot afterwards be heard to complain of the act (see *Halsbury's Laws of Malaysia*, Vol 26, 2005, *Malayan Law Journal*, p 555, para 450.402).

B

[42] Action dismissed with costs to the defendant.

Action dismissed with costs.

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Reported by K Nesan

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